

No. 14079.

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

LESSIE B. HENRY and MILDRED LOUISE McDAVIS,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 22920 CD.

Upon Appeal From the District Court of the United States
for the Southern District of California, Central Division.

Hon. William M. Byrne, District Judge.

OPENING BRIEF OF APPELLANTS.

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STATEMENT OF BASIS OF JURISDICTION.

This is an appeal from a judgment by the District Court of the United States for the Southern District of California, Central Division, after a trial by the Court, sitting without a jury, finding the defendants and appellants guilty of a violation of U. S. C., Title 21, Section 174 (the illegal sale and concealment of narcotics). The appellant Lessie B. Henry was sentenced to a term of imprisonment for four years and to pay a fine of \$1,000.00 on each of Counts 1, 2, 3 and 4, concurrently (total fine,

\$1,000.00). The appellant Mildred Louise McDavis was sentenced to three years' imprisonment and a fine of \$1.00 on each of Counts 1, 2, 3 and 4, the sentences to run concurrently (total fine, \$1.00). The defendant Lessie B. Henry had been charged in Count 5 of the Indictment, but on this count he was acquitted [Clk. Tr. p. 16, as to McDavis; p. 14, as to Lessie B. Henry].

Following the judgment the appellants Henry and McDavis filed a timely notice of appeal, and are presently serving their terms in Federal institutions. Applications for bail, both to the District Court and this Court, were denied.

STATEMENT OF THE CASE.

The Indictment.

The Indictment charged a violation of U. S. C., Title 21, Section 174—illegal concealment and sale of narcotics.

Count 1 charged the defendants and appellants Lessie B. Henry and Mildred Louise McDavis with having, on or about February 12, 1953, in Los Angeles County, California, knowingly received, concealed and facilitated the transportation of approximately 436 grains of heroin; they, the defendants, then and there well knowing that the same had been imported in the United States of America contrary to law.

Count 2 charged a similar offense on or about February 13, 1953.

Count 3 charged a violation of U. S. Code, Title 21, Section 174, in that, after importation, the defendants had sold to one, Frank Stafford, 436 grains of heroin, on or about February 12, 1953.

Count 4 charged that the defendants and appellants Henry and McDavis had, after importation, sold to one, Frank Stafford, 430 grains of heroin, on or about February 13, 1953, in Los Angeles County.

Count 5 charged one, Jennell James, and Lessie B. Henry, one of the appellants in this case, with the transportation of 257 grains of heroin, on or about February 15, 1953.

After a verdict of guilty as to Counts 1 to 4, inclusive, and not guilty as to Count 5 as to the appellant Lessie B. Henry, a motion for new trial was duly made [Clk. Tr. pp. 11, 12]. This motion was denied.

The Judgment.

Defendants Lessie B. Henry and Mildred Louise McDavis were found guilty of Counts 1 to 4, inclusive, of the Indictment; Henry was found not guilty of Count 5.

The Court sentenced defendant and appellant Lessie B. Henry to four years' imprisonment and to pay a fine in the sum of \$1,000.00 on each of Counts 1, 2, 3 and 4, concurrently (total fine, \$1,000.00).

The Court sentenced defendant and appellant Mildred Louise McDavis to three years' imprisonment and to pay a fine of \$1.00 on each of Counts 1, 2, 3 and 4, concurrently (total fine, \$1.00) [Clk. Tr. pp. 12, 13].

While Jennell James took no appeal, she was sentenced to three years' imprisonment, which sentence was suspended, and she was placed on probation for a period of three years, on condition that she pay a fine in the sum of \$350.00, at the rate of \$10.00 per month [Clk. Tr. p. 13].

The motion for new trial as to defendants Lessie B. Henry and Mildred Louise McDavis was duly made, and by the Court denied [Clk. Tr. pp. 11, 12].

The Evidence.

Evidence was offered by the Government by a witness, Stribling, to the effect that he was a chemist, and that he tested the material here in question and that it was a narcotic. For the purpose of this appeal it was stipulated that the material involved herein was a narcotic drug known as heroin [Clk. Tr. p. 22]. A witness, Walter D. Kephart, testified he was a staff representative of the Pacific Telephone & Telegraph Company, and that he had access to certain records of the telephone company; that he had the records of the Los Angeles telephones, REpublic 37096 and REpublic 23155; that REpublic 37096 was listed during the period January, 1953, under the name of Wilma Carter at 2538 Fourth Avenue, Apartment 303. That the telephone, REpublic 23155, during January, 1953, was an unlisted number, but was listed to Jennell James at 2945 11th Avenue, Apt. 2. The bills as to REpublic 37096 were sent to Wilma Carter at 2945 11th Avenue, Apt. 2, the same address to which the bill for REpublic 23155 was sent [Rep. Tr. pp. 9, 10]. The witness stated that they had no records in the telephone company which bore the signature of subscriber [Rep. Tr. p. 16].

Frank Stafford testified he was employed by the Government of the United States, Narcotic Division, as an undercover agent [Rep. Tr. p. 30]; that he was so employed in February, 1953; that he was paid for his services [Rep. Tr. pp. 30, 31]; that he knew Lessie B. Henry, had known him for about three and one-half years [Rep.

Tr. p. 31]; that he knew Jennell James, had known her about one and one-half years [Rep. Tr. p. 31]; that he knew a girl known as Mildred for about a year and one-half. That on or about February 9, 1953, he met the defendant Lessie B. Henry in the 2900 block on 11th Avenue at an apartment house [Rep. Tr. p. 35]; that there were present Jennell, Mr. Henry's mother, and another man; that he was there about an hour before Mr. Henry arrived [Rep. Tr. pp. 36, 37]; that after Mr. Henry arrived, he had a conversation with him in the dining room [Rep. Tr. p. 43]. That at that time he asked Mr. Henry if it was possible to purchase an ounce of heroin, and Henry said it was possible, and he then asked Henry what the price would be, and Henry replied it would be \$300.00 [Rep. Tr. pp. 43, 44]; that he told Henry he was not ready, but that as soon as he got ready he would make arrangements [Rep. Tr. pp. 44, 45]. That a day or two later he talked with Mr. Henry on the telephone; that he was in his own home in the presence of Officers Ross and Cassidy at the time he had the conversation; that he called a REpublic number, and Mr. Henry answered the phone [Rep. Tr. pp. 45, 47]; that he then told Henry he was ready to tend to the business that he had discussed a day or two previous, and Henry replied he was ready, but that he would have to get dressed and call back, which he did about an hour and a half later, and in that conversation he told the witness to go to Washington and Western; that someone would meet him; that he asked Henry if the party knew him, and Henry replied, "Yes, it will be someone who will know you." That the officers then searched him and searched his car, and gave him \$300.00 [Rep. Tr. pp. 47, 48]. That he went to Western, just off Washington,

and in about ten minutes Mildred drove up; that he walked to the car, and Mildred told him to get in his car and follow her; that they then drove east on Washington to Harvard. She drove by, parked her car and walked back to the witness's car [Rep. Tr. pp. 49, 50]; she got in his car and told him which direction to go; that she asked for the money; he put the money on a napkin, and she put it in her purse [Rep. Tr. p. 51]. That after driving some distance, she got out of the car and instructed the witness to go on 22nd Street, which he did, and he remained there about ten minutes and she drove up and told the witness to follow her [Rep. Tr. pp. 54, 55]; they stopped near Hobart in the middle of the block and she then instructed the witness to go to a Richfield Station on Adams, and that the heroin would be in the bushes in front of the toilets [Rep. Tr. pp. 53, 54]; that he drove to the location and picked up a package near the toilets, and as he did, Officer Ross walked up and he handed the package to the officer. A minute or so later, Mildred came up and he told her he had picked up the package, and she said O. K., and they parted [Rep. Tr. p. 55]. The next day he talked to Mildred McDavis again over the telephone; at that time he asked her where Henry was, and she said he had gone to the barbershop, and she gave him a telephone number [Rep. Tr. pp. 57, 58]; that he called the barbershop and talked with Henry, said he was ready to transact the same business that he had had the day before; that he had shown the stuff to his partner, and he was satisfied with it. Henry said it was the same stuff and the price would be the same; that he was then talking from his house, and Officers Ross and Coster were present [Rep. Tr. p. 58]. That in about two hours the phone rang and it was Mildred. Mildred asked if he had

talked with Henry, and he said "yes," and that Henry was supposed to call him. He asked if she had heard from Henry, and she said, "Yes, and I will call you back in a short while." In about five minutes, she called back and told him to go to 29th and Normandie, and to call her when the witness arrived. The officers then searched him, gave him \$300.00, and he went to 29th and Normandie [Rep. Tr. p. 59]. In about ten minutes Mildred came up and he went over and got in her car and she asked for the money. They counted out the money, and she then drove him back to his car and told him to go to 27th and Normandie and wait; that he went to 27th and Normandie [Rep. Tr. p. 60], and was there about fifteen minutes when Mildred came up; he got in the car with her, and she said that at 27th and San Pedro, and in front of the restaurant, there was a telephone booth, and that under the box the witness would find a package of heroin. He went there, followed by Officer Ross, looked under the box, and got the package of heroin. Officer Ross followed him, and on arrival at his home, he gave the package to Officer Ross [Rep. Tr. p. 61]. Officer Coster also came to his house, and he then made a phone call to Henry; that he was then sitting in a big arm chair, and Officer Coster sat on the arm and had his head by the receiver listening to the conversation; that he called Henry "Papa," and said "This boy I picked up is all beat up. He is bleeding all over the place." Henry replied, "Oh, he is all right, you check it and you will find it all there." [Rep. Tr. p. 63.]

On cross-examination the witness testified that he had been convicted of a felony, possession of narcotics, in 1935; that he had used narcotics [Rep. Tr. pp. 65, 66]; that he had used heroin, sometimes opium; that he had

had some heroin the night before he testified [Rep. Tr. pp. 66, 67]; that he had sold narcotics [Rep. Tr. p. 69]; that he had gone to work for the Government about the middle of January, 1953 [Rep. Tr. p. 71]; that one of the officers had asked him, he thought it was Mr. Ross; that he was to be paid \$35.00 a week [Rep. Tr. pp. 72, 73]. That when he was given the money upon one occasion, he had a \$100.00 bill and the rest in large bills—\$20.00's or \$50.00's [Rep. Tr. pp. 84, 85]. The witness on cross-examination admitted that he used about a cap a day of narcotics, which cost him about \$4.00 a day [Rep. Tr. p. 130].

Philip P. Ross testified he was a Federal narcotic agent; had been with the service about three and one-half years. That he went to the vicinity of 2945 11th Avenue, Los Angeles, once about February 9, and again on February 11, 1953, in company with Agent Coster, and he saw Mr. Stafford go into the house at 2945 11th Avenue, and a short time after, Les Henry drove up [Rep. Tr. p. 206]; shortly thereafter Henry left, and Stafford came out a short time later; this was on the 9th. On the 11th, he saw Stafford go into the address shortly after he saw Henry drive up and go into the house; shortly thereafter Mr. Stafford and Mr. Henry came out and he saw them both in front of the house; that they left in separate cars [Rep. Tr. p. 206]. That on February 12, 1953, he was at the home of Mr. Stafford with Agent Coster [Rep. Tr. p. 208]; that Stafford dialed REpublic 37096 and had a conversation [Rep. Tr. p. 209]. About an hour and a half later, Mr. Stafford received a phone call, and thereafter Agent Coster gave him \$300.00 government money; that he searched Stafford and followed him to Western and Washington [Rep. Tr. p. 212]; shortly thereafter

they saw Mildred McDavis drive up, Stafford went to her car and then returned to his car; she drove away and Stafford followed. Shortly thereafter they stopped and Mildred McDavis got into Stafford's car, and they drove south on Oxford past 21st Street, at which time Mildred McDavis left his car and returned to her car; about fifteen minutes later she drove by again, and Stafford followed her to about 22nd and Harvard. She then left her car, came back to his car, returned to her car, then again returned to her car, and they drove off, and McDavis stopped on Adams Boulevard and Stafford drove to 25th Place and Adams. They followed Stafford and walked over to where he was standing, which was in front of the ladies' rest room by some flowers, and Stafford reached over and picked up a package and gave it to the witness [Rep. Tr. p. 214]; the package he brought to the Federal Building. On the 13th of February he went to Stafford's apartment and Stafford dialed REpublic 37096 and had a conversation. Later he received a telephone call; they then searched Stafford and gave him \$300.00 Government money; Stafford left and they followed him to 29th and Normandie; a short time thereafter Mildred McDavis came by, Stafford entered the car, they drove around the block and she returned him to his car and she drove away. Stafford drove to 27th and Normandie [Rep. Tr. p. 224]; he parked the car and waited about fifteen minutes, at which time Mildred McDavis drove up; that they were parked about a block away [Rep. Tr. p. 225]. After Mildred McDavis drove away, Stafford left and the witness followed him to 27th and San Pedro, at which place he saw Stafford go to a telephone booth at the corner of 27th and San Pedro, and enter it. He stayed there a very short time, then returned to his car, and the witness

followed Stafford to his house, at which time Stafford gave him a package, which was initialed and given to Agent Garberson at the Narcotics Division office. That on February 15th he went to the address at 2945 11th Avenue with Agents Garberson, Coster and Gentry; that about 3:00 o'clock they saw Henry and Jennell James come from the house and enter a Ford; from there they drove to 29th and San Pedro, Jennell James left the automobile at that location and the witness followed Henry back to 2945 11th Avenue.

That on February 15th he participated in the arrest of Henry at about 9:00 P. M. in the evening at Sunset Boulevard and Castelar Street; Henry was with Jennell James. At the time of his arrest they searched him and took \$2200.00 from him. That they returned to the premises at 2945 11th Avenue at about 1:00 or 2:00 o'clock the following morning and searched the premises; that he found a package containing some Spotless Freezer Bags in a box of groceries in the kitchen of the house. That on February 15, 1953, he went to an address at 50th Street and Vermont Avenue, and that about half way in an alley between Vermont and Kansas Street he took a package from the base of a building, Government's Exhibit 3-B-1 [Rep. Tr. p. 241]. The officer stated that while talking with Henry that he had accused him of obtaining money through the sale of narcotics, but Henry did not say that he had received the money from the sale of narcotics; he said that he had received the money from the sale of narcotics; he said that he had received it from other people [Rep. Tr. pp. 263, 264].

Charles F. Garberson testified he was an agent connected with the Bureau of Narcotics, Federal Government,

and had been for about a year and a half; that on February 12, 1953 he saw the defendant Henry at an address on Fourth Avenue in a vehicle that went to 2945 11th Avenue, and there was a female in the car with him; subsequently he followed this car from the 11th Avenue address, a female was driving it, and the car went to Western and Washington where Frank Stafford was standing on a corner; Stafford walked over to the car and then returned to his car, and he then followed Stafford who drove to about 21st and Oxford, and about five minutes later a colored female left Stafford's car and went to the Chevrolet which he had been observing. He then lost both parties [Rep. Tr. pp. 306, 307]. That on the 13th of February he saw Henry on Central Avenue in the 4200 block, at which time he was driving a Ford convertible; that he saw Henry come out of McKinney's Barber Shop [Rep. Tr. p. 309]. A little later that day, February 13, he was in the vicinity of Arlington and Adams and he saw the brown Chevrolet he had previously observed, and in it was Mildred McDavis. He followed the car and he then saw Stafford's car shortly thereafter; Stafford parked at 27th and Normandie, and in a few minutes the brown Chevrolet came across 27th and Normandie, and Frank Stafford got out of his car and walked east on 27th Street [Rep. Tr. p. 312], and in a short time Stafford returned to his own car and drove south on Normandie [Rep. Tr. p. 313].

That on February 15th he went to 2945 11th Avenue; later in the afternoon he saw the defendant Henry with Jennell James driving in a 1953 Ford convertible; he followed them to a place near 29th and San Pedro, where he lost them; later that afternoon he was at the 11th

Avenue address where he saw the same car [Rep. Tr. pp. 315-316].

That he participated in the arrest of Mr. Henry and in the search that was made of Henry, and there was \$2,280.55 taken from Mr. Henry's person [Rep. Tr. p. 316]. That he had made a list of currency, Government's Exhibit 5-A; that he made a list of currency on February 12th and February 13th, and after making the list of the numbers from the currency, he gave the money to Agent Ross; that some of that money he again saw on February 15th, being a part of the money taken from Mr. Henry [Rep. Tr. p. 321]. On February 12th and 13th he had taken serial numbers of some currency in the presence of Agents Ross and Coster [Rep. Tr. p. 355], and that he did not see that money again until the 15th when they removed some money from Mr. Henry's person; that subsequently he met Mr. Henry in the Federal Building and Henry demanded a return of his money, at which time he gave Mr. Henry \$1,400.00 and retained \$880.00 [Rep. Tr. pp. 361-363].

Ernest M. Gentry testified he was District Supervisor, United States Bureau of Narcotics, 14th District at San Francisco; that on February 15, 1953, he saw the defendant Henry and the defendant Jennell James [Rep. Tr. p. 365], at some time after 3:00 P. M. in the vicinity of 2945 Eleventh Avenue, at which time they were going toward a 1953 red Ford convertible automobile and they entered the car and drove away to about 29th and San Pedro to where the Ford was parked, and Miss James got out; the car drove away and Miss James walked down 29th to San Pedro and toward 28th, and she walked in an alley between a house and went behind 658½ East

28th Street [Rep. Tr. pp. 370-371]; she reappeared about ten minutes later and walked to the spot where she had left Henry and there was a barbecue and she went inside for a moment or two, then a cab drove up and she entered the cab and went to 50th and Vermont, where she went to Von's supermarket, where she alighted from the cab, walked in the door of Von's and down an alley that ran at a 90-degree angle to Vermont [Rep. Tr. pp. 371, 372]; he did not see her again until the 15th of February, 1953 [Rep. Tr. p. 373]. That while Miss James was in the alley near Von's Market, she placed a white object on the ground and took her foot and stomped the area; thereafter he saw Agent Ross retrieve a package from that spot [Rep. Tr. pp. 375-376]. On February 16, 1953, the agents went to an address at 658½ East 28th Street, where they went to a basement, and Agent Davis, who accompanied them, discovered six packages containing a white, powdery substance, and this was marked Government's Exhibit 3-B-1; that on the night of the 15th, the night of the arrest of Henry and James, he was present at a conversation with the defendant Henry.

Jennell James testified in her own behalf that she had lived in Los Angeles for 12 years; that she knew Henry, had known him for about four years; that she knew Mildred McDavis and had known her for about three years; and that she knew the witness Stafford as "Sleepy" [Rep. Tr. pp. 423-424]; that she was living at 2945 11th Avenue in February with Mrs. Pauline McCoy, who was Mr. Henry's mother; that Mildred McDavis and Henry moved into the establishment in February [Rep. Tr. p. 423]; that Stafford, or "Sleepy," had been

at the 11th Avenue address on several occasions. That on or about the 9th or 10th of February, Stafford came to the 11th Avenue address and asked for Mr. Henry. Some time afterwards Mr. Henry came in, at which time they had a conversation. Sleepy then asked Henry if he, Henry, wanted the house painted, and Henry told him no, that he was going on a trip; that after he returned he would talk more about it. Sleepy had some papers there, and said he wanted to sell a house. Henry told him he wasn't interested in buying a house. That there was no time while Sleepy was there that Henry and Sleepy were alone; there was no conversation regarding narcotics [Rep. Tr. pp. 431-432]. The witness testified that she had received several calls over the telephone from her mother and from a friend; that she was contemplating going to Hot Springs, Arkansas [Rep. Tr. pp. 433, 434, 435]; the witness denied that she had ever been in the vicinity of 50th Street in an alley, or that she had gone to a Von's Market [Rep. Tr. pp. 444-445].

Lessie B. Henry testified he had lived in Los Angeles seven or eight years, and that he lived at 2945 11th Avenue; that he moved from 4th Avenue to 11th Avenue about the 15th of February, 1953; that the apartment he had occupied on 4th Avenue was later rented by Wilma Carter; that he was acquainted with the witness Stafford by the name of "Sleepy"; that from time to time Sleepy would call him; that had given Sleepy his telephone number, both at 4th Avenue and on 11th Avenue [Rep. Tr. p. 450]; that Sleepy used to talk to his mother from time to time; that upon one occasion Sleepy had painted his mother's house inside and out. That about the 9th of February, someone called him and said Sleepy was at his mother's, and he went over there, at which time

Jennell and his mother were present; that he was there fifteen or twenty minutes, during all of which time his mother was there; that he sat in the dining room, and at that time he talked a few minutes with Sleepy. That at first Sleepy started talking about painting the house, that he needed a job, that he was broke [Rep. Tr. p. 453]. At that time the witness stated that he told Sleepy that he was going on a trip, and he said, "You can paint the place, but not now," but Sleepy said he wanted to paint the place because his wife was sick; then the witness testified that he told Sleepy he needed what money he had because he was going on a trip; that he had loaned Sleepy money many times, none of which had ever been repaid [Rep. Tr. pp. 453-454]; that he always considered Sleepy a friend of his mother's and of himself. Then Sleepy said he had some papers of a house, which was either his or his son-in-law's; that he wanted to sell, and he said he would sell it and he would have some money to pay the witness back if he could lend him some money. At that time the witness stated he told Sleepy he was not interested in buying the house [Rep. Tr. pp. 453-454]; that while Sleepy was in the house on the 9th of February, nothing was said about heroin or any narcotics [Rep. Tr. pp. 455-456]; that on the 10th Sleepy called him at the barbershop; that there was nothing said about narcotics at that time on the telephone; the witness stated he told Sleepy that he was just getting in the barbershop, and he would see him later [Rep. Tr. pp. 456-457]; that after leaving the barbershop he went to the 4th Avenue address and Mildred McDavis was there; that he stayed there; that he did not receive any phone calls that day [Rep. Tr. pp. 457-458]. That on the 12th he had a phone call from Sleepy, and Sleepy

wanted to know if he could get some money, that he wanted to paint the house, and the witness stated he told Sleepy he wasn't interested. That he never offered to sell Sleepy any narcotics, that he had no narcotics to sell [Rep. Tr. p. 459]; that he was arrested on the 15th of February, and that on the 13th he never left the apartment, except to go to his mother's; that on the 13th of February he had no conversation with Sleepy about narcotics [Rep. Tr. pp. 461-462]. That on the 13th he had a conversation with Mildred, at which time Mildred told him that she had received \$300.00 from Sleepy, that Sleepy had given her the money to keep, and Mildred then gave him the money to keep for Sleepy [Rep. Tr. pp. 462-463]; that on the 14th he received a phone call from Sleepy; that on the 14th he and Mildred went over to his mother's in the afternoon [Rep. Tr. p. 464]; that his mother and Jennell and Mildred were there. He walked in the house and Sleepy said he needed his money, and at that time he gave him \$600.00; that Mildred had given him \$300.00 one day and \$300.00 on another day, and had said it was Sleepy's money for keeping until Sleepy asked for it [Rep. Tr. p. 466]. That on the 15th, Mildred McDavis walked out of the house with him in the daylight; they got in the Ford and they drove to San Pedro Street over to Central; that he stopped at the intersection of 29th and San Pedro, and that Mildred was with him, dressed in slacks and wearing a purse and glasses; she got out at a barbecue stand, and he went to get his shoes; that he did not hand her any packages [Rep. Tr. pp. 469-470]. He then went over to Central Avenue, that the place was closed, and that he went directly home; when he arrived Jennell was there; later Mildred called him and he went over and picked her

up at 43rd and Vermont [Rep. Tr. pp. 470-471]; and they then returned home.

The witness denied that he at any time gave any narcotics to Sleepy, or that he had any narcotics in his possession, or that he ever talked about the possession or sale of narcotics [Rep. Tr. pp. 472-473]. When his attention was directed to Government's Exhibit 1-C, he denied having ever seen the package; denied ever having seen Government's Exhibit 3-A; the only time he ever saw any packages was when the police showed him a package and asked him if he had seen it before [Rep. Tr. p. 474].

That at the time of his arrest there was \$2,280.00 taken from his person, and some time later he had \$1,400.00 given back to him by the Government agents [Rep. Tr. p. 476]. The witness stated that he never knew at any time that the Government agents were following him [Rep. Tr. pp. 476-477].

Gracie Cox testified she lived at 2945 11th Avenue. Apt. 1, and was living there in February, 1953; that she lived there with her husband and brother and sister-in-law. That she knew Jennell James; that Jennell James, in February, was living at the same address in Apartment 2 [Rep. Tr. pp. 499, 500]; that on the 15th day of February she saw Jennell James and, to the witness's knowledge, Jennell James did not leave the house that day [Rep. Tr. pp. 501, 502]; the witness stated that she knew it was the 15th because Jennell and Henry were leaving for a trip [Rep. Tr. pp. 503, 504].

Eva Mae Bradley testified that she lived at 2171 West 30th Street; that she knew Jennell James, and that she was at her house February 15th. She had been there for

a few days occupying her apartment with her, and she slept there the night before; that Jennell was there at all times that day [Rep. Tr. pp. 510, 511, 512]. That on the 15th, during the course of the day in the afternoon, she saw Mr. Henry come to the establishment accompanied by Mildred McDavis; this was about 1:00 o'clock in the afternoon [Rep. Tr. pp. 512, 513].

Tessie Mae Hynson testified she was the mother of Jennell James; that she lived at 1938 Rimpau Boulevard, Los Angeles; that her daughter, Jennell James, on the 15th of February was residing on 11th Avenue; that Jennell was planning a trip, she having been operated on [Rep. Tr. pp. 522, 523]. That she communicated with her daughter on the 15th at about 1:30, talked with her on the telephone at her home, and she was there; she talked with her again at 4:15, and she was there. She particularly remembered these conversations because the girl had had surgery and the doctor had told her to be quiet for a day or two [Rep. Tr. pp. 524, 525].

Jennell James testified that on the 14th of February, at her home on 11th Avenue, she saw a person known as "Sleepy"; that she saw Henry count out some money and hand it to Sleepy [Rep. Tr. pp. 526, 527].

Pauline McCoy testified that on the 14th of February she saw "Sleepy"; that she had known him for three years; that she had been friendly with him. That Sleepy was there in the afternoon, and Mildred Jennell and her son were there, and she saw her son count out some money and give it to Sleepy. At that time Sleepy said he wanted to paint the house; that he also wanted her son to buy a house from him, Sleepy. Her son said he couldn't, he

wasn't able to, but that he would see about it after his trip [Rep. Tr. p. 530].

Mildred Louise McDavis testified she lived at 2945 11th Avenue; that she moved there about February 15th; that she moved in with Mr. Henry, defendant in the case; that she had known him about three years [Rep. Tr. pp. 534, 535]; that she had known Sleepy, that he had been over to their home many times. That about February 12th she had a phone call from Sleepy; that he asked for Henry, and she told him Henry was not there. Sleepy then said he would like to see her; she asked him what he wanted, and he said he would prefer to come over and talk to her rather than over the phone [Rep. Tr. pp. 538, 539]. He said he would like to meet the witness and she said she would meet him, so she met him. At that time she asked him what he wanted and he said he wanted her to do a favor for him, and she asked, well, what is it? and Sleepy said, "Well, I can't discuss it right now because I think I am being followed." Sleepy told her he was going to drive around and see if he was still being followed, and he told her to meet him at a certain place, and she did [Rep. Tr. pp. 539, 540]. When he met her he asked her to keep some money for him. She said, "How much?", and he said, "\$300.00." She then asked him why he couldn't keep it himself, and he said he would prefer not to. She then asked him about his being followed, what was happening, but he said that he would rather not discuss it, but that it had nothing to do with the money [Rep. Tr. pp. 540, 541]. She then asked, did he want her to have the money. She then said she was a little leery about it, and he said he would make sure he wasn't being followed. He then told her to meet

him at another place, and she did. He was standing on the street, and she drove up and he gave her the money and told her he would call later. Later she saw Henry and told him about the meeting with Sleepy; she then gave the money to Henry [Rep. Tr. pp. 541, 542]. She saw Sleepy again on the 13th, at which time he called her and said he wanted to see her. He then gave her a number and she called him back, for she said she had not dressed yet. After she dressed she called him, and Sleepy asked her to meet him again and she went to the place he had named [Rep. Tr. pp. 542, 543]. When they met she said, "Did you call me to get your money?" and he said "No," that he thought he was still being followed, and asked her to keep driving, and they drove around. He then gave her some more money, \$300.00, and asked her to keep it for him. She then went home and she gave the money to Henry [Rep. Tr. pp. 544, 545]. That on the 15th of February she moved; Henry was leaving on his trip that day; that they moved around noon to the 11th Avenue address, and there she saw Jennell, Mrs. McCoy, Peggy and Grace [Rep. Tr. pp. 544, 545]. That she left there during the afternoon with Henry in a 1953 Ford: that they intended to go to the Louisiana Hot Spot on 29th Street where they specialized in barbecue [Rep. Tr. pp. 546, 547] and they went there; Henry did not get out of the car because he was going to the shoe shop to get his shoes; that she told Henry that she would call a cab after she was through shopping. Henry then left; she went into the barbecue place; then she went to a grocery store but found it was closed; then she went across the street to a public restroom on 28th Street. She then went back to the Louisiana Hot Spot, and at the barbecue stand she had something to eat [Rep. Tr. pp. 548, 549,

550]. She got in a cab and drove to Von's Market on Vermont. She had shopped there before, and that she went out of the market through the front door, the same one she entered [Rep. Tr. p. 552]. She then went to a drug store and made some purchases; she then called Henry and he came and picked her up and they went directly home [Rep. Tr. p. 553]. That on the early morning of the 16th of February she was aroused by officers who came in and searched the premises; that she had her clothes on the dining room chair, at which time one of the officers said, "Are these the clothes" [Rep. Tr. p. 556].

Frank J. Stafford was recalled as a rebuttal witness, and stated that after the 12th of February he had never been to the 11th Avenue address; that he never received \$600.00, or any sum, from either Mr. Henry or Miss McDavis or Miss James [Rep. Tr. p. 597].

SPECIFICATIONS OF ERROR.

I.

The defendants were entrapped by the agent working with the Government narcotic agents. The conviction, therefore, must fall.

II.

The evidence is insufficient to support Counts 1 and 2 of the Indictment, charging, in effect, transportation. The judgment in this case also amounts to double punishment and double jeopardy.

SUMMARY OF THE ARGUMENT.

1. It is our contention that the witness Frank J. Stafford, also known as "Sleepy," was a paid informer, as is shown by the evidence, and he was actually working for agents of the Government, narcotics officers and being paid \$35.00 a week. He admitted on cross-examination that he was a user of narcotics, and that he had been employed by the narcotics officers and had been told by them what to do and who to contact. For some time he had been friendly with the defendants, had visited at their home, and quite often visited the residence of the defendant Henry's mother. In fact, it was Stafford who went to the mother's home and waited for Henry. It was he who first suggested that Henry obtain some narcotics for him. There is no evidence in this case which shows that the idea first arose in the mind of either of these appellants. The entire scheme was laid out by the Government agents and carried out by the agent Stafford. It was, we say, entrapment.

2. It is our contention, in connection with Point 2, that the evidence was insufficient to support Counts 1 and 2 of the Indictment, which, in effect, charged transportation. That if any transportation be proved, and we contend that it was not, that it was only incidental to the "sales" which Stafford, the Government agent, claims were made. Nothing in the entire evidence shows this. Notwithstanding appellant Henry was seen to leave the house and McDavis rode with him, there is nothing to show that he had any narcotics in the car, or that he aided in any manner or facilitated the transportation thereof, if, in truth, and in fact, narcotics were actually transported by anyone in this case.

ARGUMENT.

I.

The Defendants Were Entrapped by the Agent Working With the Government Narcotics Agents. The Conviction Therefore Must Fall.

The evidence clearly shows that Frank J. Stafford, also known as "Sleepy," was a narcotic user who had satisfied his desire for heroin only the night before he testified [Rep. Tr. p. 67]; that he was an ex-convict [Rep. Tr. p. 65], and was in the employ of the Government as an undercover agent working for the Narcotic Division, and paid for his services [Rep. Tr. pp. 30, 31]. That he knew appellant Henry for three and one-half years [Rep. Tr. p. 31]; appellant Mildred McDavis, a year and a half, and defendant Jennell James about three and one-half years [Rep. Tr. p. 341]. That on February 9, 1953, he went to the home of defendant Henry on 11th Avenue, Los Angeles; that when he arrived Mr. Henry was not there [Rep. Tr. p. 35], but Jennell and Henry's mother were. He waited [Rep. Tr. p. 36] for an hour or more [Rep. Tr. p. 36] for Henry, during which time, at his request, Jennell phoned and tried to locate Henry [Rep. Tr. p. 38]. That after waiting and trying to reach Henry, he arrived [Rep. Tr. p. 43]; that he had a conversation with Henry in which he asked if it was possible to get some heroin [Rep. Tr. p. 44]; Henry said, "Yes"; then Stafford, or "Sleepy," said he was not ready at that time but would call him as soon as he got ready and make arrangements [Rep. Tr. pp. 44, 45]. A day or two after, he called Henry on the phone [Rep. Tr. pp. 45, 46]; Stafford was calling from his home while Narcotics Officers Ross and Cassidy were present [Rep. Tr. p. 46]. He told Henry he was ready to attend to the business they

had talked about. Henry said he would call back, which he did later, and agreed to a meeting place, saying some one would be there who knew Stafford [Rep. Tr. pp. 47, 48]. The officers present then searched Stafford and gave him \$300.00. He then met Mildred McDavis, gave her the money [Rep. Tr. pp. 50, 51, 52], and she told him to go to a Richfield Station near Adams, where he would find a package in the bushes in front of the toilets there. He went there, picked up a package and gave it to Narcotics Officer Ross [Rep. Tr. pp. 54, 55]. A day or two later he called Mildred on the telephone [Rep. Tr. p. 57]; he asked for Henry and she said he was at the barber's, and he could call; she gave him a number [Rep. Tr. pp. 56, 57]. He called, talked to Henry, and said he wanted to transact the same business [Rep. Tr. pp. 57, 58]. Henry said he would call; he did not, but Mildred did, and arranged to met him [Rep. Tr. pp. 58, 59]. Officers Cassidy and Ross gave him \$300.00, and he drove over and met Mildred, and she directed him to a restaurant where he picked up the heroin in a phone booth; he then went home and there gave the package to Ross [Rep. Tr. p. 61]. Stafford stated a Government agent, Ross, asked him to go to work for them [Rep. Tr. pp. 71, 72] and instructed him what to do [Rep. Tr. p. 72], and he was paid \$35.00 a week [Rep. Tr. p. 73].

Surely this was entrapment. The plan conceived in the mind of the officer, and this paid narcotic user, ex-felon, told what to do. Henry and McDavis were lured into this trap by a man who had known them for years—visited at their home. This is against sound public policy.

Butts v. United States, 273 Fed. 35, 38;

Newman v. United States, 299 Fed. 128, 131;

Sorrells v. United States, 287 U. S. 435, 77 L. Ed. 413.

See also:

Lufty v. United States, 198 F. 2d 760;

Woo Wai v. United States (C. C. A. 9), 233 Fed. 412;

Sam Yick v. United States (C. C. A. 9), 240 Fed. 60.

II.

The Evidence Is Insufficient to Support Counts 1 and 2 of the Indictment, Charging, in Effect, Transportation. The Judgment in This Case Also Amounts to Double Punishment and Double Jeopardy.

We will not here again review the evidence, for it has already been fully stated, we respectfully suggest, in our statement of the evidence. Counts 1 and 2 of the Indictment allege transportation of the narcotic by these defendants. Counts 3 and 4 allege sales of the narcotic. Counts 1 and 3 and Counts 2 and 4 appear to state the same incidents. In other words, if the entrapping informer, the Government agent Stafford, who was a narcotic user, is to be believed, and Counts 3 and 4, the "sales" counts, are to stand, it is our contention that Counts 1 and 2 were but incidental; that is to say, the transportation was but incidental to Counts 3 and 4, the "sales." The only evidence with reference to transportation is the fact that the appellants were seen in an automobile. They both explained that their trip in the car was for a legitimate purpose, and there is no evidence from which it might be properly inferred that the trip was for anything else. No one saw them take anything out of the automobile; no one saw them put anything in the automobile, and there is nothing from which the

Court could believe beyond a reasonable doubt that these appellants transported the narcotic, as is alleged.

In order to impose separate punishments, the courts have held that there must be evidence of separate and divisible acts that are not incidental to each other. In determining this question, the courts have refused to dissect the evidence minutely in an attempt to find separate offenses, but, on the contrary, have held that a broad transactional approach should be made. The evidence in the instant case, so viewed, shows that any transportation by these appellants was incidental to its sale, if it be held that a sale was, in truth and in fact, established beyond all reasonable doubt. However, we still assert that there was no evidence of transportation, and if there was, it was incidental. We respectfully say Counts 1 and 2 must fall.

While the trial court was the trier of facts, and we are familiar with the rule, however, this Court has a right to examine the evidence and consider the same in properly determining the issues herein presented. It is difficult to understand what induced the Court to reach its decision, for the conviction rests upon the evidence of an ex-convict, a paid entrapper and a narcotic addict, who had used heroin as late as the night before he testified. It should be borne in mind that Stafford's testimony as to what occurred at the Henry home was refuted by Henry himself and by Henry's mother, and the testimony with reference to the comings and goings of the defendant Jennell James was refuted by three or four witnesses. Surely, their testimony should not be cast aside and that of a witness, the type of Stafford, believed, but this is what the Court did, apparently.

It is our contention that Counts 1 and 2 of the Indictment must fall, for any transportation, if the Court determine any had been established, was incidental to the sales, if the Court believe they were established beyond all reasonable doubt. The convictions as to Counts 1 and 2 as to these appellants is in violation of Amendment V to the United States Constitution—"nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

While we realize that decisions by appellate courts of our states are not binding, this subject of double punishment has been quite thoroughly treated recently in the case of *People v. Branch*, decided by the District Court of Appeal, First District, Division 1, California, 260 P. 2d 27. 30.

See also:

People v. Knowles, 35 Cal. 2d 175, 217 P. 2d 1.

In the *Knowles* case, *supra*, numerous cases are cited which we think establish our point, and the Court had this to say:

"The possession of narcotics is an offense distinct from the transportation thereof, but there can only be one conviction when a single act of transportation is proved, and the only act of possession is that incident to the transportation."

See also:

Schroeder v. United States (C. C. A. 2), 7 F. 2d 60, 65.

In the *Schroeder* case, *supra*, at page 65, the Court further said:

“Possession for a substantial time, and followed by transportation, might constitute two distinct offenses, just as possession for a substantial time, followed by a sale, might amount to two distinct offenses. But, where the only possession shown is that which is necessarily incidental to the transportation, the offense is single, and not double.”

Citing:

Miller v. United States, 300 Fed. 529, 534;

Morgan v. United States, 294 Fed. 82, 84;

Rossman v. United States, 280 Fed. 950, 953;

Reynolds v. United States, 280 Fed. 1.

The law is settled that, where a person is tried and convicted of a crime which has various incidents included in it, he cannot thereafter be tried and punished for an offense consisting of one or more such incidents. To do so would be to inflict double punishment.

In re Nielsen, 131 U. S. 176, 185.

Conclusion.

The Court erred in the particulars that we have pointed out, and for the reasons set forth hereinabove, we respectfully pray that the judgments and the orders denying the motions for new trial be reversed and set aside as to each of the appellants, to the end that justice may be done.

Respectfully submitted,

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